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No. 96-1619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BUREAU VERITAS,

Petitioner,

vs.

CARBOTRADE SPA, ON ITS OWN BEHALF AND AS ASSIGNEE OF ESSEX CEMENT COMPANY, TITAN CEMENT CO., S.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, in a dispute where neither the ship nor the shipowner is a party, the law of the vessel's flag should be applied in preference to that of another jurisdiction whose contacts with the dispute greatly outweigh those of the flag state?

LIST OF PARTIES

The parties to the proceedings are those set forth in the caption. The Respondent Carbotrade, S.p.A. and Titan Cement Co., S.A. have no corporate parents or subsidiaries. The foregoing statement is provided in accordance with Rule 29.6 of the Rules of the Supreme Court of the United States.

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The Respondent Carbotrade, SpA ("Carbotrade" or "Respondent"), on its own behalf and as assignee of Essex Cement Company and Titan Cement Company, respectfully requests that the Court deny the Petition of Bureau Veritas ("BV" or "Petitioner") for a Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Second Circuit in this matter reported at 99 F.3d 86. For the convenience of the Court, all citations to the opinion will be to the opinion attached as Exhibit A to the Petition.

CORRECTION OF MISSTATEMENT OF FACTS IN THE PETITION

The majority opinion of the Court of Appeals for the Second Circuit correctly sets forth the facts pertinent to this appeal. The opinion accurately depicts the nexus between the relevant facts and the jurisdictions involved as well as the appropriate weight to be given each relevant fact in this matter.

Pursuant to United States Supreme Court Rule 15.2, Respondent brings the following misstatements of fact in the Petition to the Court's attention:

1. Petitioner misstates the date when BV began carrying out the intermediate survey which is the subject of the dispute. (Petition-3). In particular, Petitioner indicates that its intermediate survey began "in the interim," suggesting that it began sometime between March 20 and 23, 1989. Rather, BV's negligent surveys were carried out between March 6 and 28, 1989 (A-4), well before the classification certificate expired or Respondent's surveyor went aboard the vessel to carry out his inspection to determine that the vessel's holds were cargoworthy, *i.e.*, watertight and dry. (A-14).

2. The United Kingdom Department of Transport ("U.K.D.O.T."), after carrying out its own investigation, rendered a report regarding the cause of the vessel's sinking. (A-5). In addition to concluding that the vessel was improperly loaded and experienced stormy weather conditions while crossing the Atlantic, as Petitioner contends (Petition-3), the U.K.D.O.T. concluded that one of the proximate causes for the sinking was that the vessel was "reduced in structural strength." (A-5). BV's intermediate survey was designed to detect precisely this type of deficiency. BV's exclusive surveyor ignored his own test results, credited the test, and extended the classification certificate on which Carbotrade relied to its detriment.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals Properly Applied this Court's Decision in *Lauritzen*

There is no conflict between the Court of Appeals' decision in this case and this Court's decision in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953). Petitioner, however, attempts to create such a conflict. This requires that *Lauritzen* be read with blinders, that this Court's and other courts' interpretations of *Lauritzen* be ignored, and that the facts of this dispute be entirely disregarded.

Relying solely on the dissenting opinion, Petitioner repeatedly quotes *Lauritzen* as if it had been ignored by the Court of Appeals. Not so. In deciding the choice of law issue in this case, the majority of the Court of Appeals fully understood and appreciated the importance of the law of the flag, as it did each of the other factors set forth in *Lauritzen.* (A-9 to A-14).

The majority opinion states "(t)he *Lauritzen* Court noted that the strong considerations in favor of applying the law of the flag 'must prevail unless some heavy counterweight appears.' 345 U.S. at 586." (A-9). The Court of Appeals also correctly notes that "[t]he law of the flag . . . is only one of several factors to be considered and in *Rhoditis* itself the Supreme Court applied United States law notwithstanding that the ship flew a Greek flag, the plaintiff was a Greek citizen, and his employment contract was signed in Greece. 398 U.S. at 308, 310." (A-9).

In its *de novo* review and vacatur of the district court's decision, the Court of Appeals held that "the factors favoring the application of Greek law greatly outweigh [the law of the flag] factor." (A-13). In so holding, the Court followed closely *Lauritzen* and its progeny. The Court stated:

> The fact that the allegedly tortious act was committed in Greece, as well as the presence of BV, the vessel's owners, and the vessel's operating company in that country, give Greece considerably more substantial contacts than the United Kingdom with

> this dispute. Therefore, we believe, that Greek law should apply.
>
> BV contends that we nonetheless should favor the law of the flag in order to create certainty as to which laws apply to claims against classification societies. We disagree. Whatever significance law of the flag may have in cases where the ship or its owner is a party and where other factors fail to point clearly to another jurisdiction's law, we see no reason to apply the law of the flag here in preference to that of another jurisdiction whose ties are more pertinent to the dispute, especially given the fact that neither the ship nor the owner is a party.

(A-13).

The Court of Appeals did not misapply *Lauritzen*, as Petitioner contends, nor did it mechanically apply the law of the flag to the exclusion of the other *Lauritzen* factors, as Petitioner would ask this Court to do. To the contrary, in this case, where neither the ship nor the shipowner are parties, the Court of Appeals properly considered *all* of the *Lauritzen* factors and applied the relevant ones to the facts of this case.

1. The decisions which followed *Lauritzen* support denial of this Petition.

As the Court of Appeals correctly states, in *Lauritzen* and its progeny, the Court "rejected a strict *lex loci delicti* approach to resolving conflicts questions in maritime tort cases" and has adopted an interest analysis that looks to, among other factors, (1) the place of the wrongful act; (2) the law of the ship's flag; (3) the domicile of the injured party; (4) the domicile of the shipowner; (5) the place of the contract; (6) the inaccessibility of the foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations. (A-8).

Furthermore, in *Lauritzen*, Justice Jackson specifically cautioned against excessive reliance on the law of the flag or, as Petitioner prays for in this case, its mechanical application. *Lauritzen*, 345 U.S. at 582.

In *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959), the Court again warned against the mechanical application of the law of the flag. *Id.* at 388.

In *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970), *reh. denied*, 400 U.S. 856 (1970), after reciting the seven *Lauritzen* factors, the Court reiterated its warning that the "*Lauritzen* test . . . is not a mechanical one," and that the "list of seven factors in *Lauritzen* was not intended to be exhaustive." *Id.* at 308-09. The Court stated that the shipowner's "base of operations" was another factor of importance "and there well may be others." *Id.* at 309. In applying U.S. law, the Court concluded that:

> [t]he flag, the nationality of the seaman, the fact that his employment contract was Greek and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts that his alien owner has with this country.

Id. at 310.

In the instant case, the Court of Appeals properly considered each of the factors relevant to the *Lauritzen* choice of law analysis stating that, "[t]he weight to be given each factor varies from case to case and the list is not an exhaustive one." (A-8) (citing *Rhoditis*, 398 U.S. at 308-09).

The Court of Appeals also correctly held that

> [t]he law of the flag . . . is only one of several factors to be considered and in *Rhoditis* itself the Supreme Court applied United States law notwithstanding that the ship flew a Greek flag, the plaintiff was a Greek citizen and his employment contract was signed in Greece. 398 U.S. at 308, 310. The Supreme Court in *Rhoditis* noted with approval our decision in *Bartholomew v. Universe Tankships Inc.*, 263 F.2d 437, 441 (2d Cir. 1959), in which we stated that the decision as to whether to apply

> United States law, specifically, the Jones Act, to a particular tort claim by a seaman against his employer "involves the ascertainment of the facts or groups of facts which constitute contacts between the transaction involved in the case and the United States, and then deciding whether or not they are substantial . . . . "
>
> Although *Rhoditis* was a Jones Act case, we believe that nothing in the Court's opinion limits its application to such cases and *Rhoditis's* emphasis on applying the law of the state with the most substantial contacts to the event giving rise to the claim applies to all maritime tort cases.

(A-9).

Finally, Petitioner's reliance on *Sundance Cruises Corp. v. American Bureau of Shipping*, 7 F.3d 1077 (2d Cir. 1993), *cert. denied*, ___U.S. ___, 114 S.Ct. 1399, 128 L.Ed.2d 72 (1994), is equally misplaced. (Petition 6-7). That case, with a fact pattern quite dissimilar to this case, concerned a dispute by a shipowner against its classification society for claims arising out of a statutory certificate which was issued by the classification society on behalf of the vessel's flag state. *Sundance,* 7 F.3d at 1082-83. The plaintiff-shipowner had chosen the vessel's flag. The issue in dispute involved acts undertaken by the classification society on behalf of the flag state, and the shipowner argued against the application of the law of the flag which it had voluntarily selected. *Sundance*, 7 F.3d at 1082. None of these critical factors are present in this case.

In its efforts to apply mechanically the law of the flag to this action, Petitioner glosses over *Rhoditis*, *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959), and numerous other cases which applied interest analyses. The Court of Appeals rightly rejected these efforts.

2. The facts of this case clearly support the denial of this Petition.

After properly analyzing the law, the Court of Appeals reviewed the facts, weighed the relevant contacts, and determined that the most substantial factors favored the application of Greek law. (A-13). The Court found that the following factors mandated the application of Greek law: (1) the place of the wrongful act (Petitioner's activities in Greece and its negligent misrepresention of the condition of the vessel by issuing its classification certificate in Greece) (A-11); (2) the domicile and base of operations of the defendant (BV's maintaining one of its permanent offices in Greece where it voluntarily chose to establish itself, thereby subjecting itself to that country's laws) (A-11-12); (3) the domicile and base of operations of the shipowner (the actual owners of the vessel being Greek, as were the directors) (A-12); and (4) the domicile and base of the vessel's operating company (located in Greece). (A-12).

Petitioner stretches beyond logic the issue of where the wrongful act occurred. Relying on district court decisions in cases concerning personal injuries, Petitioner insists that, regardless of where the negligent act, or misrepresentation or reliance occurred, the place of the wrongful act in this case was the "high seas" because that is where the vessel sank. (Petition-8). Petitioner's reliance on personal injury cases is misplaced. Respondent's cause of action is based, *inter alia,* on Petitioner's negligent misrepresentation. According to the RESTATEMENT (SECOND) CONFLICT OF LAWS § 148, "when the plaintiff has suffered pecuniary harm on account of his reliance on defendant's false representations and when the plaintiff's actions in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties . . . ." *Id.* Here, those factors unequivocally point to the application of the law of Greece.

Moreover, Petitioner attempts to cast itself in the mold of a shipowner by quoting *Lauritzen*'s description of the

shipowner defendant in that case as engaged in "an enterprise conducted under many territorial rules." (Petition-7). In this case, the Court of Appeals correctly found BV's "enterprise" to be entirely dissimilar to that of the shipowner-defendant in *Lauritzen*: "unlike the typical Jones Act case, wherein a seaman is injured aboard a vessel and the place of the tort is often happenstance, BV's conduct was out of an office in a country where BV had chosen to establish itself and thereby become subject to that country's laws." (A-11).

According to the Court of Appeals, the domicile and base of operations of the plaintiff favored the application of neither Greek nor British law. (A-12). The other *Lauritzen* factors such as the place of the contract, the accessibility of the foreign forum and the law of the forum were irrelevant to the facts of this case. In fact, they were found to serve no useful purpose in any choice of law analysis "and have been denigrated." (A-10).

The only factor pointing to application of British law was the vessel's flag. (A-12). While the Court of Appeals observed that Respondent had submitted evidence demonstrating that the STAR OF ALEXANDRIA's flag was one of convenience (A-13), the Court held that, even if the British flag was not one of convenience,

> the factors favoring application of Greek law greatly outweigh this factor. The fact that the allegedly tortious act was committed in Greece, as well as the presence of BV, the vessel's owners, and the vessel's operating company in that country, give Greece considerably more substantial contacts than the United Kingdom with this dispute.

(A-13).

In its Petition, BV raises for the fourth time the very issues it raised below. The Court of Appeals considered and rejected these arguments. Petitioner's dissatisfaction with the Court of Appeals' decision is not a basis for this Court to grant the Petition for a Writ of Certiorari.

Petitioner mentions other factors which it contends point to the application of British law. (Petition-6). Some of these factors, such as the vessel's manning requirements, her certificates, and the U.K.D.O.T.'s post-casualty investigation, are merely part of the obligations and regulations of the flag state. They do not constitute choice of law factors (these factors having previously been considered and rejected by the district court when BV's motion to dismiss the complaint on, among other grounds, *forum non conveniens* was denied in 1992).

Petitioner wrongly accuses the Court of Appeals of doing an "about face" by allegedly departing from the principles established in *Lauritzen.* (Petition-7). More accurately, Petitioner is merely dissatisfied with the weight which the Court of Appeals gave to the "substantial" factors relevant to this case. It is the Petitioner who has now done an "about face" by arguing that factors such as a defendant's base of operations, or a shipowner's base of operations, should not be considered. (Petition 9-10). Previously, Petitioner had strenuously argued in favor of these factors, hoping that they would point to somewhere other than Greece. Petitioner's gamble at the Court of Appeals backfired, and its own "about face" should not be countenanced by this Court.

Contrary to BV's assertion that it "simply had placed a surveyor at a Greek port where the plaintiff herein had chosen to send the vessel" (Petition 12), BV voluntarily established a permanent office in Greece where its exclusive surveyor committed the negligent acts in question (A-11-12). Similarly, true ownership and control of the vessel resided in Greece (A-12), as did the company responsible for operating the vessel. (A-12).

The Court of Appeals properly and fully analyzed the law, applied the relevant facts of this case, and correctly held that Greek law should govern this dispute. In so doing, the Court of Appeals followed the reasoning of *Lauritzen* and its progeny.

B. The Court of Appeals' Decision is Consistent with All Other Circuit Courts

Petitioner incorrectly asserts that the Court of Appeals' decision in this case is inconsistent with the Courts of Appeals for the Third and Fifth Circuits. Petitioner's assertion is based upon its conclusion that the Second Circuit's decision herein constitutes an "abandonment of the 'law of the flag'." (Petition-14). As outlined above, nothing could be further from the truth. Following *Lauritzen*, the Second Circuit Court of Appeals fully considered the law of the flag and, given the facts of the case, held it to be of diminished importance to this dispute. (*See* Point A, *supra*).

In fact, the Third, Fifth and Ninth Circuit Courts of Appeals have each recognized the flexibility of *Lauritzen* and have also held, under the particular facts of certain cases, that the law of the flag was of diminished importance. *See Neely v. Club Med Management Services, Inc.*, 63 F.3d 166 (3d Cir. 1995) (en banc) (because the location of the accident was not "fortuitous," the place of the wrongful act is of greater significance and the law of the flag is less important). *See also Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995) (en banc) (finding in favor of the law of the place of the wrongful act noting that the law of the flag "has no specific application" to a dispute against the non-shipowner defendant, *Id.* at 1120); and *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980) ("the law of the flag should not be accorded controlling weight because of the facts of this case," *Id.* at 86-87, holding that the law of the place of the wrongful act was more substantial than the law of the flag).

Petitioner's reliance on *Nunez-Loazano v. Rederi*, 634 F.2d 135 (5th Cir. 1980), *Anastasidais v. S.S. LITTLE JOHN*, 346 F.2d 281 (5th Cir. 1965), *Chirinos de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240 (3d Cir. 1980), and *DeMateos v. Texaco Inc.*, 562 F.2d 895 (3d Cir. 1977), does nothing to advance its cause. In each of these personal injury cases, where the shipowner and/or the ship was a defendant and, on facts quite different from those involved here, the court found that

the law of the flag was the most substantial factor. In this case, as in *Rhoditis* and the more recent and factually similar cases referred to above (*Neely*, *Coats* and *Phillips*, *supra*), the law of the flag was held to be less substantial than the other contacts, and the courts found that law other than the law of the flag should apply.

No conflict between the circuits exists. The Court of Appeals for the Second Circuit properly applied the law to the particular facts of this case, and held that Greek law should apply. This Petition should be denied.

C. This Petition does not Present a Question of Recurring Importance

Relying on its misguided understanding that the Court of Appeals abandoned the law of the flag factor in its choice of law analysis, Petitioner sounds a false alarm for "a clear mandate . . . to guide courts in the future as to the law which should be applied." (Petition-17). The Court of Appeals has already done this by carrying out an intensive interest analysis, separating the relevant facts from the minutiae relied upon by Petitioner, and giving the law of the flag the weight it deserves in this case which involves neither the ship nor the shipowner.

Review by this Court is unnecessary.

CONCLUSION

BV's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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